



**DEPARTMENT OF THE NAVY**  
BOARD FOR CORRECTION OF NAVAL RECORDS  
701 S. COURTHOUSE ROAD, SUITE 1001  
ARLINGTON, VA 22204-2490

█  
Docket No. 4851-23  
Ref: Signature Date



Dear Petitioner:

This is in reference to your application for correction of your naval record pursuant to Title 10, United States Code, Section 1552. After careful and conscientious consideration of relevant portions of your naval record and your application, the Board for Correction of Naval Records (Board) found the evidence submitted insufficient to establish the existence of probable material error or injustice. Consequently, your application has been denied.

Although you did not file your application in a timely manner, the Board waived the statute of limitation in accordance with the 25 August 2017 guidance from the Office of the Under Secretary of Defense for Personnel and Readiness (Kurta Memo). A three-member panel of the Board, sitting in executive session, considered your application on 25 September 2023. The names and votes of the panel members will be furnished upon request. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of the Board. Documentary material considered by the Board consisted of your application together with all material submitted in support thereof, relevant portions of your naval record, and applicable statutes, regulations, and policies, to include to the Kurta Memo, the 3 September 2014 guidance from the Secretary of Defense regarding discharge upgrade requests by Veterans claiming post-traumatic stress disorder (PTSD) (Hagel Memo), and the 25 July 2018 guidance from the Under Secretary of Defense for Personnel and Readiness regarding equity, injustice or clemency determinations (Wilkie Memo). The Board also considered the advisory opinion (AO) of a qualified mental health provider and licensed clinical psychologist which was previously provided to you. Although you were afforded an opportunity to submit a rebuttal, you chose not to do so.

You enlisted in the Marine Corps with a pre-service history of alcohol and drug use and, after being granted a waiver for drug use, began a period of active duty on 1 October 1986. You were subject to nonjudicial punishment (NJP), on 3 February 1987, for a violation of the Uniformed Code of Military Justice (UCMJ) under Article 112a due to wrongful use of a controlled substance, marijuana. In addition to forfeitures of pay, your punishment included 30 days of correctional custody during which, on 9 February 1987, you sought medical care for pain due to a reported back injury which had occurred approximately one month prior. In a follow up medical exam on 11 February 1987, you reported that your pain had been aggravated and

continued to worsen. Following an orthopedic consultation on 12 February 1987, you were admitted for hospitalization to further examine the nature and extent of the injury and to provide palliative care. The record of your hospitalization states that “[a]fter two days the member was able to ambulate ... his back pain had become significantly improved. On the 3rd hospital day the back pain had nearly completely resolved” with minimal pain at the time of discharge to convalescent leave.

You accepted a second NJP, on 19 March 1987, for a violation under Article 108 of the UCMJ for destruction of U.S. Government property – specifically, by kicking in a bathroom door. Following your first and second NJPs, you were counseled regarding your need to take corrective action with respect to your conduct. However, you continued to receive administrative counseling for misconduct; first, on 13 July 1987, you were counseled for an unauthorized absence (UA), on 29 January 1988, you were advised to treat superiors with respect after using contemptuous language toward a noncommissioned officer, and, on 8 February 1988, you were warned of the potential for administrative separation due to your frequent involvement with military authorities.

On 17 February 1988, you received a substance use evaluation which diagnosed you with alcohol dependence and recommended formal rehabilitation treatment. You also accepted two additional NJPs for alcohol related offenses in March 1988 and May 1988. Your third NJP involved an offense under Article 92 for possessing and drinking alcohol beverages under the legal age. Your fourth NJP included two specifications under Article 92, again for drinking alcoholic beverages under age, and an offense under Article 134 for drunk and disorderly behavior.

You absented yourself without authority from 1 July 1988 until 6 September 1988. Following your return, you were tried by Special Court-Martial (SPCM), and you pleaded guilty to a single specification of UA under Article 86. You were sentenced to a Bad Conduct Discharge (BCD), three months of confinement, and concurrent forfeitures of pay. Although you waived your rights to clemency and appellate review on 20 November 1988, your SPCM proceedings were forwarded for legal review. Upon conclusion of review, your punitive discharge was ordered executed and you were discharged, on 14 February 1989, with a BCD.

Your previous application to the Board, Docket No. 5636-16, was considered on 31 July 2017, wherein you asserted that you had received a Good Conduct Medal (GCM) and contended that your discharge should be upgraded because the mark of desertion had been removed from your record as erroneous. As explained in the Board’s previous decision, the record clearly shows your desertion was removed in order to return you to duty to be processed for committing an SPCM offense for your period of UA. Likewise, and in light of the fact that you continue in your current application to assert that you received a GCM, block 18 of your Certificate of Discharge or Release from Active Duty (DD Form 214) contains a remark which reflects the date to which the beginning period of your potential eligibility for a GCM had been reset due to your misconduct. You would have to have complete a minimum of 3 years of active duty service without further misconduct, *beginning* from 30 January 1989, to be eligible for such award, which you did not.

The Board carefully considered all potentially mitigating factors to determine whether the interests of justice warrant relief in your case in accordance with the Wilkie Memo. These

included, but were not limited to, your desire to upgrade your discharge to “Honorable” with a change to your narrative reason for separation and separation code to reflect “Secretarial Authority,” as well as your contentions that you incurred an injury during your active duty service which, as a result of the injury trauma and chronic pain, resulted in your development of an alcohol use disorder and contributed to the primarily alcohol related misconduct that resulted in your BCD. You state that your service was faithful and dutiful prior to your injury, but that the Marine Corps failed to acknowledge that your behavior and misconduct was symptomatic of an undiagnosed mental health condition which resulted from your severe trauma and lasting pain due to your injury. You believe that you were awarded the GCM and that you were only “partially convicted” of your attempts to self-medicate your injury, pointing out that you were not convicted of the additional charges related to drug and/or alcohol possession, notwithstanding your previous NJPs for marijuana and alcohol use. In this regard, you add that you were falsely accused of a crime by another Marine, whom you allege was motivated by racial animus, and this accusation resulted in your UA because you were not guilty of the offense. In light of the above contentions, you believe that your request merits liberal consideration under current policy and that the totality of circumstances renders your discharge an injustice due to being the direct result of your claimed mental health condition. For purposes of clemency and equity consideration, the Board considered the entirety of the evidence you provided in support of your application.

Because you contend that a mental health condition affected the circumstances of your punitive discharge, the Board also considered the AO. The AO stated in pertinent part:

There is no evidence that he was diagnosed with a mental health condition in military service, or that he exhibited any psychological symptoms or behavioral changes indicative of a diagnosable mental health condition. He has provided no medical evidence in support of his claims. There is evidence of both pre-service and active duty alcohol and marijuana abuse. Given the significant and pervasive substance use pre-service, it is likely that the Petitioner developed a dependency early on. It is probable that he did use substances to quell physical pain, however, it is likely that the dependency problems existed prior to his back injury. Furthermore, destroying government property and disorderly conduct are not typical behaviors resulting from a mental health condition. Unfortunately, his personal statement is not sufficiently detailed to establish clinical symptoms or provide a nexus with his misconduct. Additional records (e.g., medical records containing the events described by the Petitioner, post-service mental health records describing the Petitioner’s diagnosis, symptoms, and their specific link to his misconduct) would aid in rendering an alternate opinion.

The AO concluded, “it is my considered clinical opinion there is insufficient evidence of a mental health condition that may be attributed to military service. There is insufficient evidence that his misconduct could be attributed to a mental health condition.”

After thorough review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. Specifically, the Board determined that your misconduct, as evidenced by your NJPs and SPCM, outweighed these mitigating factors. In making this finding, the Board considered the seriousness of your misconduct and found that your conduct showed a complete disregard for military authority and regulations. Further, the Board concurred with the AO

regarding the lack of evidence supporting your contended mental health condition as well as the lack of discernable nexus between your alcohol use disorder and certain offenses during your active duty service. With respect to the fairness of your SPCM sentence, the Board further observed that you were represented by presumptively competent, bar certified military defense counsel and afforded the opportunity to present matters in extenuation and mitigation at that time with respect to your sentencing hearing, to include your injury, potential self-medication, and motivation for committing the UA due to false allegations. Therefore, the Board was not persuaded by your arguments of unfair treatment and noted you provided no evidence to substantiate your allegations. As a result, the Board concluded your conduct constituted a significant departure from that expected of a service member and continues to warrant a BCD characterization. While the Board carefully considered the evidence you submitted in mitigation, even in light of the Kurta, Hagel, and Wilkie Memos and reviewing the record liberally and holistically, the Board did not find evidence of an error or injustice that warrants granting you the relief you requested or granting relief as a matter of clemency or equity. Ultimately, the Board concluded the mitigation evidence you provided was insufficient to outweigh the seriousness of your misconduct. Accordingly, given the totality of the circumstances, the Board determined that your request does not merit relief.

You are entitled to have the Board reconsider its decision upon the submission of new matters, which will require you to complete and submit a new DD Form 149. New matters are those not previously presented to or considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity is attached to all official records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

9/27/2023

